



# **EEOs on the Go:** **Keeping Up with Existing and Changing Labor & Employment** **Responsibilities in the Government Contracting Landscape**

**Presented April 29, 2021**



# Meet the Panelists



**Madelyne D'Angelo**  
Vice President, Operations, InquisIT

Madelyne D'Angelo has more than 20 years of experience in a variety of business operations, including a decade supporting the government sector. At InquisIT, she is responsible for the design, execution, and oversight of the organization's operational strategy, objectives, and initiatives. She previously served as Managing Director of Helios HR, Vice President of Human Resources for CRGT, Inc., and Vice President of Human Resources for L-3 STRATIS.

Madelyne earned a law degree from Duquesne University School of Law and a bachelor's degree from Slippery Rock University in Pennsylvania.



**Gunjan Talati**  
Partner, Kilpatrick Townsend

Gunjan Talati is an experienced government contracts practitioner who regularly represents contractors in a variety of sectors, including aerospace and defense, health care, and technology. His practice is a mix of regulatory compliance, transactional, and litigation matters. Gunjan's career includes two secondments at *Fortune* 100 government contractors, giving him a unique perspective on working with particular types of government contractors.

Gunjan earned a law degree from Catholic University of America Columbus School of Law and a bachelor's degree from Georgia Institute of Technology.



**Corena Norris-McCluney**  
Counsel, Kilpatrick Townsend

Corena Norris-McCluney focuses her practice on labor and employment litigation and counseling. She is an experienced attorney and human resources advisor with strong reasoning and legal counseling skills in both law firm and corporate environments. Prior to rejoining Kilpatrick Townsend, Corena was Senior Vice President, General Counsel, and Corporate Secretary at Krispy Kreme Doughnut Corporation, where she also served as Interim lead of the Company's Human Resources Department in 2017.

Corena earned a law degree from Wake Forest University School of Law and a bachelor's degree from North Carolina State University.

# Agenda

- Introductions
- Basic Government Contracts Labor & Employment Requirements
- Executive Orders
- Day-to-Day Best Practices
- Labor Violations

# Interactive Hypothetical #1

- Your company hires a new accountant. This new accountant realizes that the company is not paying prevailing wage requirements on a Service Contract. Upon reviewing the bid you realize that the company reviewed the wrong wage determination sheets and has been underpaying employees. An executive suggests that you just fire the new accountant.
- What problems does firing the new accountant cause?

# Basic Government Contracts Labor & Employment Requirements

- What's familiar?

- Non-discrimination requirements and laws
- Minimum wage requirements
- Labor Unions
- “My BoSS DoEsN’t LiKe ME!!!!!!” / “I CaN’T WoRk With \_\_\_\_ iN AcCOuNTinG AnYMOre!!!”

- Extensive restrictions on:

- Discrimination—EEOC plan, statistical analysis, etc.
- Cannot discriminate based on race, creed, color, etc.
- Some contracts have EEOC plans and statistical analyses associated with them.
- Some projects may have Project Labor Agreements on them but atypical.

# Basic Government Contracts Labor & Employment Requirements

- What's Different?



# Basic Government Contracts Labor & Employment Requirements

- What's Different?

- Prevailing Wage Requirements—what do you mean I have to pay MORE than minimum wage???
- Human Resources Issues—what do you mean I have to verify employment eligibility???
- Risks—what do you mean I have to pay the Government money just because my employee didn't have a college degree?

# Prevailing Wage Requirements—Service Contract Act

- Service Contracts often implicate SCA & SCA Labor Standards.
  - Combination of the FAR (48 C.F.R.), DOL Regs (29 C.F.R), and the SCA Statute 41 U.S.C. §351.
- McNamara-O'Hara Service Contract Act of 1965:
  - Effective 1966
  - Purpose:
    - Ensure service workers received payscale wages comparable to their counterparts in construction (Davis-Bacon Act) and manufacturing (Walsh Healy Act) when performing for the Government;
    - Ensure uniformity among bidders for service contracts.



# Prevailing Wage Requirements—Service Contract Act

- SCA applies to Service Contracts:
  - In excess of \$2,500;
  - Entered into by federal government and D.C.;
  - Performed in the U.S.; and
  - Using service employees

# Davis-Bacon Act

- Construction Contracts
- Over \$2,000
- Laborers / Mechanics performing work on-site
- Prevailing Wage



# Federal Minimum Wage

- \$10.95 per hour
- Employees “performing work on or in connection with covered government contracts”
- Push for \$15 per hour
- Can be tricky to juggle employees working on multiple contracts

# Human Resources

- E-Verify

- In effect for some time now
- Required for most private employers but laws still vary state to state
- Regardless of state law requirements—required for federal contractors

# Human Resources

## ■ Combating Human Trafficking

### What Role Does the Acquisition Workforce Have in Combating Human Trafficking?

Members of the acquisition workforce have responsibilities in all phases of an acquisition to ensure that the U.S. Government is taking action to prevent, report, and remedy human trafficking in federal contracts.

As a result of Executive Order (E.O.) 13627 and Title XVII of the National Defense Authorization Act for Fiscal Year 2013, the Federal Acquisition Regulation (FAR) was amended to strengthen protections against trafficking in persons in government contracts. The FAR explains the U.S. Government's policy prohibiting trafficking in persons, defines key terms, outlines compliance and reporting requirements, and provides remedies when allegations of human trafficking or trafficking-related activities are substantiated.

### What Can an Acquisition Professional Do to Combat Human Trafficking?

FAR Subpart 22.17 requires that clause 52.222-50, Combating Trafficking in Persons, be incorporated in all solicitations and contracts, and that the substance of this clause shall be included in all subcontracts and in all contracts with agents.

FAR clause 52.222-50 prohibits contractors, subcontractors, their employees, and their agents from:

- Engaging in severe forms of trafficking in persons
- Procuring commercial sex acts
- Using forced labor during the period of performance of the contract
- Destroying, concealing, or confiscating an employee's identity documents
- Using misleading or fraudulent recruitment practices
- Charging employees recruitment fees
- Failing to provide return transportation or pay for the cost of return transportation at the end of employment
- Failing to provide or arrange for housing that meets safety standards
- If required by law or contract, failing to provide an employment contract, recruitment agreement, or other work document in writing

The FAR clause requires contractors and subcontractors to notify employees and agents of the U.S. Government policy prohibiting trafficking in persons, and the actions that will be taken against them for violations of this policy.

### Training Available Through the Federal Acquisition Institute ([www.fai.gov](http://www.fai.gov))

- FAC-022 (FED) – Combating Trafficking In Persons

### As a Contracting Officer

Upon receipt of credible information regarding a trafficking in persons violation, the contracting officer (CO):

- Shall promptly notify the agency Inspector General (IG), and if appropriate, the agency suspending and debarring official, and if appropriate, law enforcement officials with jurisdiction over the alleged offense
- May direct the contractor to take specific steps to abate the alleged violation or enforce the requirements of its compliance plan

Upon receipt of a report from the agency IG that provides support for the allegation and after a final determination that the allegations of a trafficking in person violation are substantiated, the CO shall enter the violation in FAPIIS, and consider any remedies available to the Government including those specified at 52.222-50:

- Require the contractor to remove an employee or subcontractor employee from performing on the contract
- Require the prime contractor to terminate a subcontract
- Suspend contract payments until the contractor has taken appropriate remedial action
- Loss of award fee consistent with the award fee plan
- Decline to exercise available options under the contract
- Terminate the contract for default or cause, in accordance with the termination clause in the contract
- Suspension or debarment

When considering the appropriate remedies, the contracting officer may consider mitigating and aggravating factors.

### As a Contracting Officer's Representative

A contracting officer's representative (COR) has an important role in preventing and reporting human trafficking. The COR is designated and authorized in writing by the CO to perform specific technical or administrative functions. The COR may support the CO at the pre-proposal conference and post-award orientation where the requirements of the contract are discussed. The COR generally has authority to monitor day-to-day compliance with contract requirements including requirements of FAR clause 52.222-50 that prohibits trafficking in persons. CORs may assist in reviewing and evaluating the adequacy of a compliance plan, recruitment and wage plan, or housing plan when these plans are required; and ensure that relevant content is posted at the workplace or on the contractor's website. A COR shall immediately report to the CO any indicators of human trafficking during performance of the contract, or any credible information received from any source that alleges a violation of the U.S. Government policy prohibiting trafficking in persons, including trafficking-related activities.

# Risk / Reward

- Mandatory Disclosure Rule
  - Labor violations may be mandatory reporting situations.
- False Claims Act
  - What labor issues can give rise to False Claims Act violations?

## Interactive Hypothetical #2

- Your company holds a GSA Schedule contract. A particular labor category requires a 4-year degree from an university. You outsourced staffing to a third-party staffing agency that did not verify degrees of applicants. You hired an individual that lied about having a degree on his resume. You have been billing the Government for this employee every day since you brought him on. He does great work and the Government likes him.
- What should you do?
  - Nothing. The Government likes him, what's the big deal? Bill Gates doesn't have a 4-year degree either.
  - Quietly remove him and replace him with someone that has a 4-year degree.
  - Evaluate whether this is an instance of unqualified labor, make a mandatory disclosure if appropriate, and potentially negotiate a settlement.

# Executive Orders

- What are they?
- Who issues them?
- When are they issued?
- Why are they issued?
- How are they issued?





# Executive Order 13496

- Notification of Employee Rights Under Federal Labor Law
- Informs employees of their rights under the NLRA to organize and bargain collectively with their employers and engage in protected concerted activity
- Gives examples of illegal conduct
- Provides contact information for the NLRB

# Executive Order 13627

- Combatting Trafficking in Persons
  - Trafficking is broader than what you think it is
  - Commercial sex work
  - Recruiting companies

# Executive Order 13658 Minimum Wage for Contractors

**WORKER RIGHTS**  
**UNDER EXECUTIVE ORDER 13658**

**FEDERAL MINIMUM WAGE FOR CONTRACTORS**

**\$10.95** PER HOUR

EFFECTIVE JANUARY 1, 2021 – DECEMBER 31, 2021

The law requires employers to display this poster where employees can readily see it.

**MINIMUM WAGE** Executive Order 13658 (EO) requires that federal contractors pay workers performing work on or in connection with covered contracts at least (1) \$10.10 per hour beginning January 1, 2016, and (2) beginning January 1, 2018, and every year thereafter, an inflation-adjusted amount determined by the Secretary of Labor in accordance with the EO and appropriate regulations. The EO hourly minimum wage in effect from January 1, 2021, through December 31, 2021, is \$10.95.

**TIPS** Covered tipped employees must be paid a cash wage of at least \$7.85 per hour effective January 1, 2021, through December 31, 2021. If a worker's tips combined with the required cash wage of at least \$7.85 per hour paid by the contractor do not equal the EO hourly minimum wage for contractors, the contractor must increase the cash wage paid to make up the difference. Certain other conditions must also be met.


**EXCLUSIONS**

- Some workers who provide support "in connection with" covered contracts for less than 50 percent of their hours worked in a week may not be entitled to the EO minimum wage.
- Certain full-time students, learners, and apprentices who are employed under subminimum wage certificates are not entitled to the EO minimum wage.
- Workers employed on contracts for seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands, except when the workers are performing associated lodging and food services, are not entitled to the EO minimum wage.
- Certain other occupations and workers are also exempt from the EO.

**ENFORCEMENT** The U.S. Department of Labor's Wage and Hour Division (WHD) is responsible for enforcing the EO. WHD can answer questions, in person or by telephone, about your workplace rights and protections. We can investigate employers, recover wages to which workers may be entitled, and pursue appropriate sanctions against covered contractors. All services are free and confidential. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the EO. If you are unable to file a complaint in English, WHD will accept the complaint in any language. You can find your nearest WHD office at [www.dol.gov/agencies/eis/whd/contractor-local-office](http://www.dol.gov/agencies/eis/whd/contractor-local-office).

**ADDITIONAL INFORMATION**

- The EO applies only to new federal construction and service contracts, as defined by the Secretary in the regulations.
- Workers with disabilities whose wages are governed by certificates issued under section 1451 of the Fair Labor Standards Act must also receive no less than the EO minimum wage rate.
- Some state or local laws may provide greater worker protections; employers must comply with both.
- More information about the EO is available at [www.dol.gov/agencies/eis/whd/government-contracts/minimum-wage](http://www.dol.gov/agencies/eis/whd/government-contracts/minimum-wage).

 **WHD** WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR

1-866-467-0245  
TTY: 1-877-899-0427  
[www.dol.gov/agencies/eis/whd](http://www.dol.gov/agencies/eis/whd)

5010-101-01-01

# **Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors**

- Added sexual orientation and gender identity to list of protected categories
- Weakened through repeal of E.O. 13673?

# Executive Order 13706 Establishing Paid Sick Leave for Federal Contractors



## WORKER RIGHTS UNDER EXECUTIVE ORDER 13706

**PAID SICK LEAVE FOR  
FEDERAL CONTRACTORS**  
**ONE HOUR OF PAID SICK LEAVE FOR EVERY 30  
HOURS WORKED, UP TO 56 HOURS EACH YEAR**

**PAID SICK LEAVE** Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, requires certain employers that contract with the Federal Government to provide employees working on or in connection with those contracts with 1 hour of paid sick leave for every 30 hours they work—up to 56 hours of paid sick leave each year.

Employees must be permitted to use paid sick leave for their own illness, injury, or other health-related needs, including preventive care; to assist a family member who is ill, injured, or has other health-related needs, including preventive care; or for reasons resulting from, or to assist a family member who is the victim of, domestic violence, sexual assault, or stalking.

Employers are required to inform employees of their paid sick leave balances and must approve all valid requests to use paid sick leave. Rules about when and how employees should ask to use paid sick leave also apply. More information about the paid sick leave requirements is available at [www.dol.gov/whd/govcontracts/eo13706](http://www.dol.gov/whd/govcontracts/eo13706)

**ENFORCEMENT** The Wage and Hour Division (WHD), which is responsible for making sure employers comply with Executive Order 13706, has offices across the country. WHD can answer questions, in person or by telephone, about your workplace rights and protections. WHD can investigate employers and recover wages to which workers may be entitled. All services are free and confidential. If you are unable to file a complaint in English, WHD will accept the complaint in any language.

The law prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Executive Order.

**ADDITIONAL INFORMATION** Executive Order 13706 applies to new contracts and replacements for expiring contracts with the Federal Government starting January 1, 2017. It applies to federal contracts for construction and many types of federal contracts for services.

Some state and local laws also require that employees be provided with paid sick leave. Employers must comply with all applicable requirements.



**WHD**

WAGE AND HOUR DIVISION

UNITED STATES DEPARTMENT OF LABOR

1-866-487-9243

TTY: 1-877-889-5627

[www.dol.gov/whd/govcontracts](http://www.dol.gov/whd/govcontracts)



WH0001 001 0010

# Executive Order Whiplash

- Fair Pay and Safe Workplaces
  - Remember me?
  - Mandatory reporting of labor law violations
  - Challenged in court
  - Rescinded by Trump Administration
  - Back again?
- Non-Displacement of Qualified Workers
  - Right of first refusal
  - Liability for not bringing someone on?
  - Back again?

# Service Contract Act & Labor Standards

- The Three “541 Exemptions”:
  - Administrative
  - Professional
  - Executive
- Three factors determine exemption:
  - Salary Level
  - Salary Basis
  - Job Duties

# The Right (Practical) Stuff

- How to *actually* comply with the Service Contract Act
- Handling L&E complaints
- Whistleblower protections
- Protecting trade secrets



# Service Contract Act & Labor Standards

## ■ Administrative exemption:

- Compensated on a salary or fee basis at a rate per week of not less than the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region... exclusive of board, lodging or other facilities. (Currently \$913 per week in U.S.; updated by DOL every 3 years beginning in 2020)
- Whose primary duty:
  - is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - includes the exercise of discretion and independent judgment with respect to matters of significance.

# Service Contract Act & Labor Standards

## ■ Professional exemption:

- Compensated on a salary or fee basis at a rate per week of not less than the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region... exclusive of board, lodging or other facilities. (Currently \$913 per week in U.S.; updated by DOL every 3 years beginning in 2020)
- Whose primary duty is the performance of work:
  - requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
  - requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

# Service Contract Act & Labor Standards

- Professional exemption:

- Compensated on a salary basis at a rate per week of not less than the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region... exclusive of board, lodging or other facilities. (Currently \$913 per week in U.S.; updated by DOL every 3 years beginning in 2020)
- Whose primary duty is:
  - the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
  - who customarily and regularly directs the work of two or more other employees; and
  - who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

# Service Contract Act & Labor Standards

## ■ Other SCA exemptions:

- Construction of public buildings (DBA)
- Manufacturing (PCA)
- Contracts for carriage or freight (except U.S. Mail haul)
- Contracts for services of communications companies (e.g., radio or telephone) subject to the Communications Act of 1934
- Contracts for public utilities
- Contracts for operation of post offices

# Service Contract Act Compliance

- Examine your compliance infrastructure
  - Multiple aspects to SCA—wages and benefits
  - Are you maintaining records?
  - Do folks know what they are bidding on?
- Would you survive an audit?
  - Consider adding to internal audit function
  - Can you demonstrate wages paid using payroll records?
  - What about subcontractors?

# Government Contracts Labor & Employment Complaints

- Having tough discussions with government official and prime contractors
  - How do you protect employees facing discrimination when your customer is the one doing the discriminating?

- **Interactive Hypothetical #3**

You are a subcontractor to a prime and several of your employees work at a federal agency location. One of the agency personnel (a GS-15) does not like one of your employees. The GS-15 has made racially charged comments to your employee, a minority. Your employee has made you aware of these comments. What are your responsibilities?

# The Whistleblower Situation

- What is a whistleblower?
- What protections do whistleblowers receive under federal law?
- How do you handle a whistleblower situation?

- **Interactive Hypothetical #4 (a lot like #1)**

Your company hires a new accountant. This new accountant realizes that the company is not paying prevailing wage requirements on a Service Contract. Upon reviewing the bid you realize that the company reviewed the wrong wage determination sheets and have been underpaying employees. An executive suggests that you just fire the new accountant.

# Protecting IP

- Bayh-Dole allows universities, non-profit organizations, and small businesses to own, patent, and produce inventions developed using federal funding. (35 U.S.C. §202)
- A 1983 Presidential Memorandum & Executive Order expanded Bayh-Dole to apply to large businesses.
  - This has since been promulgated in the FAR Subpart 27.3 (48 CFR).



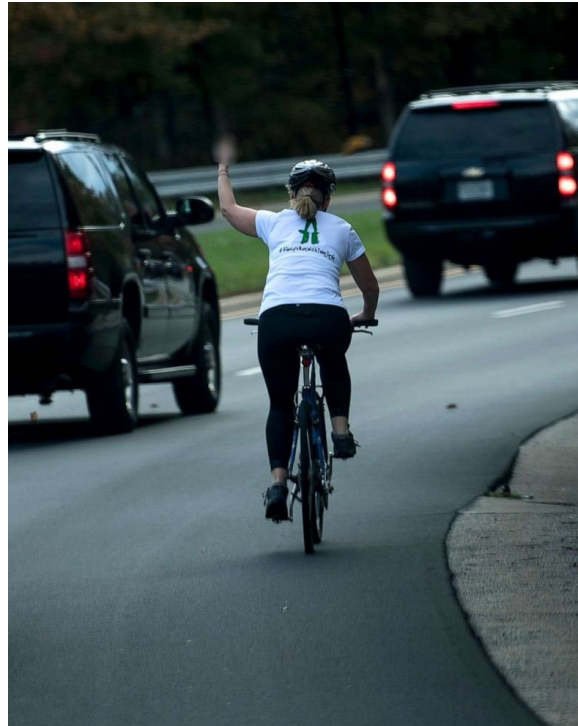
# What's Covered?

- “Subject Invention”
  - “Any invention of the contractor”
  - “Conceived” OR
  - “First actually reduced to practice” during or in
  - “The performance of work under a Government contract”
- Definition of “invention”: “Any invention or discovery that is **or** may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable. . . .”
- Definition is disjunctive—uses “OR”

# How Do You Protect the IP?

- Have policies on company ownership.
- Provide appropriate training on notice.
- Consider employee reward program.
- Follow appropriate regulations.

# Free Speech & Government Contractors



# Contact Us



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## Locations

# Counsel to innovative companies and brands around the world

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